STATE OF CALIFORNIA
REGIONAL WATER QUALITY CONTROL BOARD
CENTRAL COAST REGION

STAFF REPORT FOR REGULAR MEETING OF MARCH 24, 2006
Prepared March 3, 2006

ITEM NUMBER: **9**

SUBJECT: **Reissuance of Clean Water Act Section 301(h)-Modified NPDES Permit, Order No. R3-2006-0019, and Approval of Settlement Agreement, Morro Bay/Cayucos Wastewater Treatment Plant, San Luis Obispo County**

KEY INFORMATION:

Dischargers:	City of Morro Bay and Cayucos Sanitary District
Facility Name:	Morro Bay/Cayucos Wastewater Treatment Plant
Facility Address:	160 Atascadero Road Morro Bay, California 93442 San Luis Obispo County
Type of Waste:	Municipal wastewater
Treatment:	Facility effluent is a blend of primary- and secondary-treated wastewater. All flow receives primary treatment. Approximately 1 MGD receives secondary treatment, which includes trickling filters, solids-contact, and secondary clarification. Blended wastewater is disinfected by chlorination, and then dechlorinated prior to discharge
Disposal:	To Pacific Ocean at Estero Bay via outfall and diffuser
Facility Design Flow:	Annual average of 2.06 million gallons per day (MGD) and peak seasonal dry weather flow of 2.36 MGD
Facility Permitted Flow:	Peak seasonal dry weather flow of 2.36 MGD
Current Flow:	1.2 MGD
Existing Order:	Waste Discharge Requirements Order No. 98-15, National Pollutant Discharge Elimination System (NPDES) Permit No. CA0047881
Recycling Requirements:	None
This Action:	Reissue NPDES Permit and approve Settlement Agreement

SUMMARY

The Morro Bay/Cayucos Wastewater Treatment Plant (hereinafter Facility) is one of the last in the Central Coast Region to operate under a Clean Water Act Section 301(h)-Modified NPDES permit. After several years of negotiation with staff and the Natural Resource Defense Council (NRDC), the Discharger has agreed to upgrade the Facility to meet full secondary treatment standards, and possibly tertiary standards, within 9.5 years. The Dischargers have already begun the upgrade process. The Executive Officer and the Dischargers have negotiated a Settlement Agreement to enforce the upgrade. The Settlement Agreement is included as Attachment 1 to this staff report. The Settlement Agreement requires issuance of one more 301(h)-Modified NPDES permit.

U.S. Environmental Protection Agency completed a Tentative Decision Document that concludes the Discharger meets Clean Water Act requirements for

reissuance of its 301(h)-Modified NPDES Permit. Water Board staff also performed a detailed evaluation of the applicable law, available data, and the regulations, and concludes that the Permit is eligible for reissuance.

There are high incidences of sea otter mortality in the vicinity of Morro Bay and Cayucos, apparently due to pathogens originating from felines, but the Discharger's unique monitoring efforts demonstrate that the subject discharge is not contributing to this problem. This matter is discussed extensively in the Fact Sheet (Attachment F to the Permit).

This item has generated a tremendous volume of written comments from environmental organizations, chief among them NRDC. NRDC argues for denial of the proposed Permit and for upgrading the Facility as fast as possible. These arguments are largely based on speculative and out-of-context statements regarding sea otters, and are not supported by actual data.

The benefits of Permit reissuance outweigh the actual or theoretical downsides, as discussed in the Fact Sheet. Staff recommends issuance of the proposed waste discharge requirements, which will effectuate the Settlement Agreement and require the Facility upgrade.

DISCUSSION

Dischargers. The City of Morro Bay and Cayucos Sanitary District (hereinafter Dischargers) are the owners and operators of the Morro Bay/Cayucos Wastewater Treatment Plant (hereinafter Facility), a municipal wastewater treatment plant.

Facility. The Facility is designed to treat an annual average wastewater flow of 2.06 MGD, and a peak seasonal dry weather flow of 2.36 MGD. The Facility provides treatment by a split stream process of physical and biological treatment. All wastewater flows through primary sedimentation basins. Approximately 1 MGD flows through secondary treatment facilities, including trickling filters, solids-contact, and secondary clarification. Secondary-treated wastewater is then blended with primary treated-wastewater and disinfected by chlorination, and then dechlorinated prior to discharge to the Pacific Ocean. Biosolids are anaerobically digested and dried, composted, and then trucked to the San Joaquin Valley for use as a soil conditioner.

Discharge and Receiving Water. Approximately 1.2 MGD effluent is currently discharged to the Pacific Ocean through a 27-inch diameter outfall that terminates with a 170-foot long diffuser in approximately 50 feet of water, 2900 feet from shore. The diffuser achieves a minimum initial dilution of 133 parts seawater for every part effluent. The zone of initial dilution is approximately 103 feet wide and 240 feet long.

This discharge is currently regulated by Order No. 98-15 and National Pollutant Discharge Elimination System (NPDES) Permit No. CA0047881. The NPDES Permit expired March 1, 2004, but continues in force until the effective date of the new permit, in accordance with 40 CFR Part 122.6. The Dischargers applied for reissuance of its Permit and 301(h) Waiver on July 7, 2003.

Regulatory History. The treatment plant was originally constructed in 1954. It was upgraded in 1964 to a capacity of 1.0 MGD. In 1982, the outfall was extended further offshore to its current location. A new treatment plant was designed in 1981 to expand capacity and meet federal secondary treatment standards[1]. Financial aid from state and federal agencies was not available. Consequently, the treatment plant's design was modified to provide biological treatment to a majority (~1 MGD), but

[1] **Secondary Treatment Standards and Clean Water Act Section 301(h).** The 1972 Clean Water Act required publicly owned treatment works to meet treatment standards that were based on performance of wastewater treatment technology available at that time. Clean Water Act Section 301 established a required performance level, referred to as "secondary treatment," that publicly owned treatment works were required to meet by July 1, 1977. The secondary treatment standards, as found in 40 CFR Part 133, are:

Parameter	30-Day Average	7-Day Average
BOD_5 and TSS	30 mg/L	45 mg/L
BOD_5 and TSS Removal	At least 85%	--
pH	6 – 9 at all times	

not all, of the projected flow. In March 1983, Central Coast Water Board staff tentatively concurred that such a discharge would comply with applicable state laws, including water quality standards, and would not result in requirements for additional treatment, pollution control, or other requirements on any other point or non-point sources.

The treatment plant was upgraded from 1983 to 1985 to a peak seasonal dry weather flow of 2.36 MGD. In 1985, U.S. EPA approved a Clean Water Act Section 301(h)-Modified NPDES Permit that waived secondary treatment requirements for Biochemical Oxygen Demand (BOD_5) and Total Suspended Solids (TSS). The Permit required 75% removal of TSS and included a 30-day average TSS effluent limit of 70 mg/L. The Permit required 30% removal of BOD5 and included a 30-day average BOD5 effluent limit of 120 mg/L. An extensive monitoring program was also required.

The Permit was first reissued in 1992. The second Permit reissuance process began in May 1997. Multiple discussions between the Dischargers, Central Coast Water Board staff, and U.S. EPA staff resulted in several revisions to the permit and monitoring program, including a slight reduction in allowed mass-emissions of BOD_5, TSS, and oil & grease; expanded biosolids reporting; revised benthic sampling locations; and a revised receiving water sampling program. In July 1998, staff again determined that the discharge would comply with applicable state laws, including water quality standards, and would not result in requirements for additional treatment, pollution control, or other requirements on any other pollutant sources. U.S. EPA issued a tentative decision to grant another waiver of secondary treatment requirements in September 1998. The Central Coast Water Board approved the NPDES Permit, waiving secondary treatment requirements, in December 1998. The California Coastal Commission determined the Permit was consistent with the Coastal Zone Management Act on January 13, 1998. U.S. EPA issued the Permit on January 26, 1999, which finally became effective March 1, 1999 (33 days after issuance).

Morro Bay/Cayucos Wastewater Treatment Plant is now one of only three remaining in California that operates under a 301(h) Waiver. Others include Goleta Sanitary District and San Diego. In 2004, Goleta Sanitary District and the Central Coast Water Board entered an agreement requiring Goleta Sanitary District to upgrade to full secondary treatment standards by November 2014. Orange County Sanitation District, the largest in the nation to operate under a 301(h) Waiver, recently elected to upgrade its treatment facilities to meet secondary treatment standards and forgo its Waiver.

In anticipation of this Permit reissuance process, staff met with and sent a letter to the Dischargers in January 2003 that requested they consider upgrading the treatment plant to meet federal secondary treatment standards and forgo their 301(h) Waiver. In a March 20, 2003 response, City of Morro Bay Manager Robert Hendrix wrote:

> "…we are using your correspondence as a catalyst for the formation of a long-term future policy on wastewater treatment. The [Morro Bay] City Council and [Cayucos] Sanitary District Board have selected members to serve on a subcommittee to work with your staff to consider a number of alternatives, formulate a draft policy or policies, and then return to the full legislative body in the late Spring of this year [2003] with a recommended course of action."

In mid-2003, the subcommittee commissioned a study as to whether an equalization basin could be added to improve treatment efficiency and allow the discharge to meet secondary treatment standards. The study concluded that an equalization basin would not accomplish this goal.

The Dischargers submitted an application for reissuance of their Clean Water Act Section 301(h)-Modified NPDES Permit on July 7, 2003. They also requested a determination ("401 Certification") as to whether the discharge will comply with applicable state laws, including water quality standards, and will not result in requirements for additional treatment, pollution control, or other requirements on any other pollutant sources. In an August 26, 2003 letter, staff declined to make such a determination, instead deferring to the Central Coast Water Board to make such a determination through joint issuance of waste discharge requirements with EPA's Permit, as provided in the Memorandum of Understanding between the State Water Resources

Control Board and EPA regarding administering CWA Section 301(h).

The existing permit expired on March 1, 2004, but continues in force until the effective date of reissuance, in accordance with 40 CFR Part 122.6.

In June 2004, after much public opposition to the 301(h)-Modified Permit, the Dischargers commenced a process to upgrade the treatment plant to meet secondary treatment standards. The Dischargers hired Carollo Engineers to assist in development of a detailed timeline to implement the upgrade. Water Board staff and U.S. EPA chose to delay the Permit reissuance process until the timeline was developed. In April 2005, Carollo Engineers presented a 15-year timeline at a public meeting of the Dischargers. After considering many public comments in opposition to the 15-year timeline, the Dischargers rejected the 15-year timeline and directed Carollo Engineers to return with a timeline that is as "quick as possible."

In May 2005, Carollo Engineers returned and presented a 9.5-year timeline to the Dischargers. The 9.5-year timeline is based on the shortest reasonable time necessary to select an engineering consultant, coordinate between the Dischargers, develop a facility plan, obtain financing and permits, and design and construct the improvements. The 9.5-year timeline requires the Dischargers to achieve full compliance with secondary treatment standards by June 23, 2015. The Dischargers accepted the 9.5-year timeline and formally proposed it to Water Board staff on June 15, 2005.

Settlement Agreement. After meeting with the Dischargers on July 15, 2005, and carefully considering its reasoning for the 9.5-year timeline, Water Board staff agreed to a 9.5-year Conversion Schedule. The Conversion Schedule is as follows:

CONVERSION SCHEDULE

Task	Date of Completion
Preliminary Activities:	
1. Morro Bay/Cayucos Negotiations for Shared Facility Plan and Cost Allocation	April 1, 2006
2. Issuance of Request for Consulting Engineering Proposals for Facilities Master Plan	October 3, 2006
3. Award of Consulting Engineering Contracts	December 22, 2006
Facilities Planning:	
1. Submit Final Draft Facilities Master Plan	September 18, 2008
2. Submit Final Facilities Master Plan	July 22, 2010
Environmental Review and Permitting:	
1. Complete and Circulate Draft CEQA Document	December 18, 2009
2. Certification of Final CEQA Document	October 18, 2010
3. Submit proof of application for all necessary permits	March 17, 2011
4. Obtain all necessary permits	March 19, 2012
Financing:	
1. Complete Draft Plan for Project Design and Construction Financing	October 22, 2008
2. Complete Final Plan for Project Financing	April 20, 2009
3. Submit proof that all necessary financing has been secured, including compliance with Proposition 218	August 20, 2010
Design and Construction:	
1. Initiate Design	April 19, 2011
2. 30 Percent Design	February 7, 2012
3. 60 Percent Design	May 7, 2012

Task	Date of Completion
4. 90 Percent Design	July 16, 2012
5. 100 Percent Design	October 19, 2012
6. Issue Notice to Proceed with Construction	January 23, 2013
7. Construction Progress Reports	Quarterly (w/ SMRs)
8. Complete Construction and Commence Debugging and Startup	April 22, 2015
9. Achieve Full Compliance with Secondary Treatment Requirements	June 23, 2015

Based on the administrative record, including population growth projections through 2015, known environmental and cumulative impacts of the Dischargers' existing wastewater treatment facilities, and evidence submitted by the Dischargers of the time needed for upgrading the Facility, this Conversion Schedule is reasonable and appropriate. Staff considered the need to develop recycled water in the region. The 9.5-year upgrade schedule allows Dischargers adequate time to consider technical and funding options for installing tertiary treatment to address recycled water needs, and to perform the associated environmental review.

In December 2005, Water Board staff and the Dischargers approved a Settlement Agreement to enforce the Conversion Schedule, which is included as **Attachment 1**. The Settlement Agreement includes escalating liquidated damages of $100 to $1,000 per day if the Discharger fails to complete a required action by the date set forth in the Conversion Schedule, and "force majeure" provisions for any event beyond the control of the Dischargers.

The Settlement Agreement contemplates that the Water Board will concur in the issuance of a 301(h)-Modified NPDES permit in order to effect the Settlement Agreement and the Dischargers' obligation to complete the upgrade within a 9.5-year period. Another 301(h)-Modified NPDES permit is necessary because the timeline to achieve compliance with secondary treatment standards exceeds the 5-year life of an NPDES permit. The next Permit will contain secondary treatment requirements, and will be accompanied by a time schedule or other order to shelter the Dischargers from mandatory minimum penalties until the upgrade is completed. If State and federal law (see 40 CFR 122.47) allow a compliance schedule in the NPDES permit, the Permit will include the interim limits and a compliance schedule, and no time schedule or other order will be necessary.

U.S. EPA Tentative Decision. U.S. EPA summarized its evaluation of the Dischargers' 301(h) application in a tentative decision dated November 10, 2005. A copy of U.S. EPA's Tentative Decision Document is included as **Attachment 2**. U.S. EPA's tentative decision is to grant the Dischargers' request for reissuance of its 301(h)-Modified NPDES permit.

Proposed NPDES Permit. The proposed Permit is included as **Attachment 3**. The Permit is formatted in the new statewide template, which includes the Monitoring and Reporting Program and Fact Sheet as attachments. The Fact Sheet includes staff's detailed Evaluation of Compliance with Permit Requirements, summary and rationale for proposed changes to the Permit, and written comments and responses. For the sake of readability, these topics will only be discussed briefly in this Staff Report. Staff encourages the reader to review the Fact Sheet, which is Permit Attachment F, for the complete discussion of these topics.

Monitoring and Reporting Requirements. The Dischargers' Monitoring and Reporting Program (MRP) is among the most comprehensive and intensive of all ocean discharges less than 5 MGD in California. Every important aspect of the treatment process, receiving waters, seafloor sediment, and marine life is monitored. Influent and effluent quality and quantity are routinely monitored to evaluate treatment process efficiency. Effluent is regularly monitored for conventional pollutants (e.g. TSS, pH), as well as whole effluent toxicity and priority pollutants (e.g. arsenic, benzene, halomethanes, etc.).

Receiving water monitoring includes both surf zone monitoring and ocean monitoring near the discharge. Surf zone monitoring includes grab samples taken on a weekly basis in the summer months and at least monthly during the winter months, at eight monitoring stations, ranging from 5600 feet upcoast of the outfall, to 5000 feet downcoast of the outfall. Samples are analyzed for total and fecal coliform organisms to assess conditions for water contact recreation and shellfish harvesting.

Ocean monitoring stations are located in a target-shaped grid around the outfall diffuser to assess the short- and long-term impacts of the discharge on the receiving water, benthic sediment, and biota in the vicinity of the discharge. Ocean monitoring data are collected quarterly by deploying electronic probes by boat at each monitoring station to measure dissolved oxygen, pH, salinity, temperature, density, and light transmittance at frequent intervals through the entire water column. The data are interpolated to create graphical cross-sections of the discharge plume. The cross-sections are used to approximate the geometry and behavior of the discharge plume under various oceanographic conditions.

Sediment monitoring is conducted annually in October, at nine stations surrounding the discharge, to assess the temporal (i.e. changes over time) and spatial (i.e. changes in distance from the outfall) occurrence of pollutants in sediment, and physical and chemical quality of the sediments. Parameters measured include sediment particle size, BOD_5, sulfides, heavy metals, and persistent organic pollutants (e.g. DDT).

Bottom-dwelling (or "benthic") organisms are monitored annually in October at the same monitoring stations where sediment monitoring occurs. Benthic community health is represented by indices of density, diversity, trophic index, species, dominance, and richness. Statistical evaluations of these indices are used to assess any changes over time or in distance from the outfall. Benthic organisms are representative of the marine population because they are most indicative of the habitat in the area of the outfall, which is primarily sandy bottom, and because adverse changes in the larger marine population would have produced changes in benthic organisms over the long monitoring history (two decades).

Evaluation of Compliance with Permit Requirements. Central Coast Water Board staff completed a comprehensive and detailed evaluation of the Dischargers' monitoring data. This evaluation included all limitations relevant to reissuance of the proposed Permit. These include effluent limitations for TSS, BOD_5, pH, and other parameters; as well as receiving water limitations for bacteria (including beach water quality), light transmittance, dissolved oxygen, pH, sulfides in sediment, organic materials in sediment, and marine life (including sea otters). Staff determined that the discharge meets all of the Permit's effluent and receiving water limitations, and that the Permit is eligible for reissuance.

Several interested parties argue that the discharge has impacted the local southern sea otter population. For convenience, that portion of the Evaluation of Compliance with Permit Requirements regarding sea otters is included here.

Toxoplasma and Sea Otters. In April 2002, an association of scientists, including those from UC Davis School of Veterinary Medicine, California Department of Fish and Game, and Central Coast Water Board staff Karen Worcester, published *Coastal freshwater runoff is a risk factor for Toxoplasma gondii infection of southern sea otters* in the International Journal for Parasitology. The study documented extensive infection of southern sea otters along the Central Coast by Toxoplasma gondii, a protozoan parasite known to originate in land-based mammals, primarily felines. The scientists theorize that sea otters become infected by T. gondii by consuming shellfish, which are filter feeders and accumulate microorganisms such as T. gondii in their tissue. More than 220 live and dead sea otters were examined between 1997 and 2001, with the goal of identifying spatial clusters and risk factors for T. gondii infection. The study found:

> "Spatial analysis of pooled live and dead otter serological data revealed a large cluster of *T. gondii*-seropositive [i.e., infected] otters (20/23, or 87% seropositive) within a 20 km coastal region centered on the towns of Morro Bay and Cayucos, California. Otters sampled from the area were nearly twice as likely to be

seropositive to T. gondii as expected, and this difference was statistically significant (P = 0.082)."

The study evaluated the cluster of high infection rates around Morro Bay and Cayucos to determine whether other risk factors could explain the cluster. The study found:

> "…significantly increased odds of *T. gondii* seropositivity were detected for otters sampled near maximal (heavy) freshwater outfalls. Based on our analysis, the odds of T. gondii seropositivity were highest for adult male sea otters samples from areas of central California with maximal freshwater outflow, especially those sampled near Morro Bay/Cayucos. No significant associations with *T. gondii* seropositivity were found in relation to sewage flow, either by univariate analysis or by logistic regression analysis. However, 96% of our otter samples (214/223) were obtained from coastal areas with minimal values for municipal sewage exposure."

Although the study suggests the high rate of infections are most closely associated with heavy freshwater outflow (the second highest rate of infection was centered around Elkhorn Slough, a freshwater outflow similar in magnitude to Morro Bay), staff was concerned that the highest infection rates are centered around the only discharge with a 301(h)-modified permit in the studied area. Scientists have speculated that flushable cat litter may be source of T. gondii in domestic wastewater. In March 2003, staff requested the Dischargers evaluate their discharge as a potential source of T. gondii. The Dischargers collaborated with the UC Davis School of Veterinary Medicine to monitor the discharge by hanging clusters of mussels from buoys at each end of the outfall diffuser. Any T. gondii present in the discharge will accumulate in the mussels over time. According to a December 13, 2004, letter from Dr. Patricia Conrad of the UC Davis School of Veterinary Medicine:

> "We were able to complete testing of 120 mussels that had been outplanted at the Morro Bay outfall buoy (30 mussels each in the early dry season, late dry season, early wet season, and late wet season). Toxoplasma RNA was not detected in any of the 120 mussels from the outfall buoy that have been tested thus far."

Although this monitoring methodology has limitations, it is the only and best method known to monitor a discharge for the presence of T. gondii. These monitoring results strongly suggest that the subject discharge is not a source of T. gondii loading to Estero Bay and is not contributing to sea otter mortality. Staff's opinion is that these pathogens originate from non-point sources.

Public Participation. The Central Coast Water Board and U.S. EPA notified the Dischargers and interested parties of its intent to reissue this NPDES Permit and provided them with an opportunity to submit their written comments and recommendations. Notification was provided through publication in the San Luis Obispo County Tribune on December 19, 2005, and through direct mailing of the Draft NPDES permit to the several known interested parties. Written comments were due February 3, 2006.

Summary of Comments and Responses. This item generated a tremendous volume of written comments. Those comments and detailed responses are found in the Written Comments and Responses section of the Fact Sheet, so will only be summarized here. The **Discharger** requested several minor revisions to the proposed permit, mostly within the MRP. These requests are reasonable and appropriate, and staff recommends most be accepted. The Discharger requests that this Region's standard wastewater collection system requirements be deleted because approval of similar statewide requirements appears imminent. Staff recommends wastewater collection system requirements be retained in the Permit because there is still considerable uncertainty as to when the statewide requirements will be adopted. However, staff recommends allowance of extra time to develop the required sewer system management plan, to be consistent with the draft statewide requirements. Staff also recommends that the Permit wastewater collection system requirements be terminated when the Discharger enrolls under the pending statewide General Waste Discharge Requirements for Sewer System Collection Agencies.

Staff received over 2200 identical emails from across the nation, in response to a **Natural Resource Defense Council (NRDC)** member action alert, urging rejection of the proposed settlement agreement because they consider the Facility upgrade schedule to be too long. Staff also received another 100 identical emails, in response to a **Defenders of Wildlife** action alert, also urging rejection of the proposed settlement agreement. Staff received several other similar letters.

NRDC submitted a comment letter entitled *Time is of the Essence*: *The Legal and Technical Reasons Why EPA and the Regional Board Must Deny the 301(h) Waiver and Require Upgrade of the Morro Bay-Cayucos Sewage Plant "As Fast As Possible."* NRDC's comments are supported by letters from **Dr. Mark Gold of Heal the Bay** and **Dr. Bruce Bell of Carpenter Environmental Associates**. The letters generally cast doubt on the Discharger's monitoring program and criticize the proposed settlement agreement and its Facility upgrade time schedule. Similar letters were submitted by **The Otter Project,** the local chapters of the **Sierra Club** and **Surfrider Foundation, California Coastkeeper Alliance,** and **Defenders of Wildlife**. These letters are included in entirety as attachments to this Staff Report.

These arguments to deny the proposed Permit and Settlement Agreement are largely based on speculative and out-of-context statements regarding sea otter health in the vicinity of the discharge, and are not supported by actual data. As discussed above, the Discharger has monitored its discharge for the pathogen that is contributing to sea otter mortality in Estero Bay and found none. Staff believes that actual data should always outweigh speculation.

Staff has previously considered every argument presented and found that none require denial of the proposed Permit or Settlement Agreement. U.S. EPA's Tentative Decision Document and staff's Evaluation of Compliance with Permit Requirements, which are based on actual monitoring data from the Discharger's approved monitoring program, both support reissuance of the proposed NPDES permit.

Note: The Discharger submitted a response to NRDC's comments on March 3, 2006. The Water Board Chair allowed this submittal, and has allowed NRDC until March 10, 2006 to respond to new issues raised in the response. Due to timing of the Discharger's rebuttal, staff was not able to provide a response in this report, but will do so in a Supplemental Sheet.

RECOMMENDATION

The Board has two options; 1) deny the proposed Permit and Settlement Agreement or 2) reissue the proposed Permit and effectuate the Settlement Agreement.

If the Board concludes that the Dischargers have not met the standards for a 301(h) modification, the Board must deny concurrence with EPA's Permit. For example, the Board might consider the evidence and conclude that the Discharger has not shown that a balanced, indigenous population (BIP) exists outside the zone of initial dilution or in areas likely to be impacted by the discharge; *and* that the Discharger has not shown that the absence of BIP is caused by other pollutant sources and that the discharge is not causing or contributing to the absence of BIP. If the Board denies concurrence, the Clean Water Act would prohibit EPA from issuing the Permit. The Board would then require a revision of the Discharger's report of waste discharge, if necessary; if not, Water Board staff would redraft the permit to include full secondary standards, notice another public comment period, and then notice another hearing. In the meantime, the Dischargers have advised that they will petition the denial to the State Water Board. If the State Water Board takes up the petition and issues an order, that will take approximately one year. Depending on the outcome, either NRDC or the Dischargers are likely to challenge the State Water Board order (or the Central Coast Water Board decision, if the petition is dismissed).

The upgrade schedule was negotiated, and is not a requirement of the Permit. Unless it denies concurrence with the 301(h) modification and issues a permit requiring full secondary treatment, the Board cannot impose a shorter schedule. A second alternative, with the concurrence of the Discharger, would be to revise the settlement agreement to provide for a shorter schedule. A continuance for

this purpose is not recommended unless the Discharger requests it, since a continuance would add additional delay to final resolution of this matter. If a new settlement is feasible, it can be negotiated while any State Water Board petition is pending.

If the Water Board concludes that the Dischargers have satisfied Section 301(h), the Water Board may not deny concurrence merely to negotiate a new schedule, since that would constitute an abuse of the Board's discretion. Denial of the Permit must be based on failure to satisfy an applicable legal requirement.

Although the legal authority regarding how a discharger must satisfy its burden of proof under Section 301(h) is somewhat inconclusive, staff has concluded that the weight of evidence adequately demonstrates that the Dischargers have met all requirements of Section 301(h).

The Discharger cannot comply with secondary treatment standards until the upgrade is complete. If a 301(h) modification is denied, the Discharger would immediately be subject to liability unless the denial is stayed (which would administratively extend the existing permit), or the Board issues a cease and desist order or time schedule order, which may only relieve a discharger from mandatory penalties for up to five years. Appeals and litigation would likely delay any resolution and delay the facility upgrade. Staff has concluded that the upgrade schedule is a reasonable compromise between the "fastest possible upgrade" and the likely outcome if the Dischargers do not agree to an upgrade schedule. Reissuance of the proposed Permit will effectuate a Settlement Agreement that immediately requires the Dischargers to commence an upgrade of the wastewater treatment plant and leads to improved discharge quality.

Staff recommends issuance of the proposed waste discharge requirements.

ATTACHMENTS

1. Proposed Settlement Agreement
2. U.S. EPA's Tentative Decision Document
3. Proposed NPDES Permit, including Monitoring and Reporting Program and Fact Sheet
4. Natural Resource Defense Council comment letter
5. Heal the Bay comment letter
6. Carpenter Environmental Associates comment letter
7. The Otter Project comment letter
8. Sierra Club comment letter
9. Surfrider Foundation comment letter
10. California Coastkeeper Alliance comment letter
11. Defenders of Wildlife comment letter
12. City of Morro Bay and Cayucos Sanitary District's March 3, 2006, response toNRDC comment letter

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